SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-91

CHARLES L. MOULTON and
PAULINE M. MOULTON,

Petitioners,

v.

FORD MOTOR COMPANY and
HULL-DOBBS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

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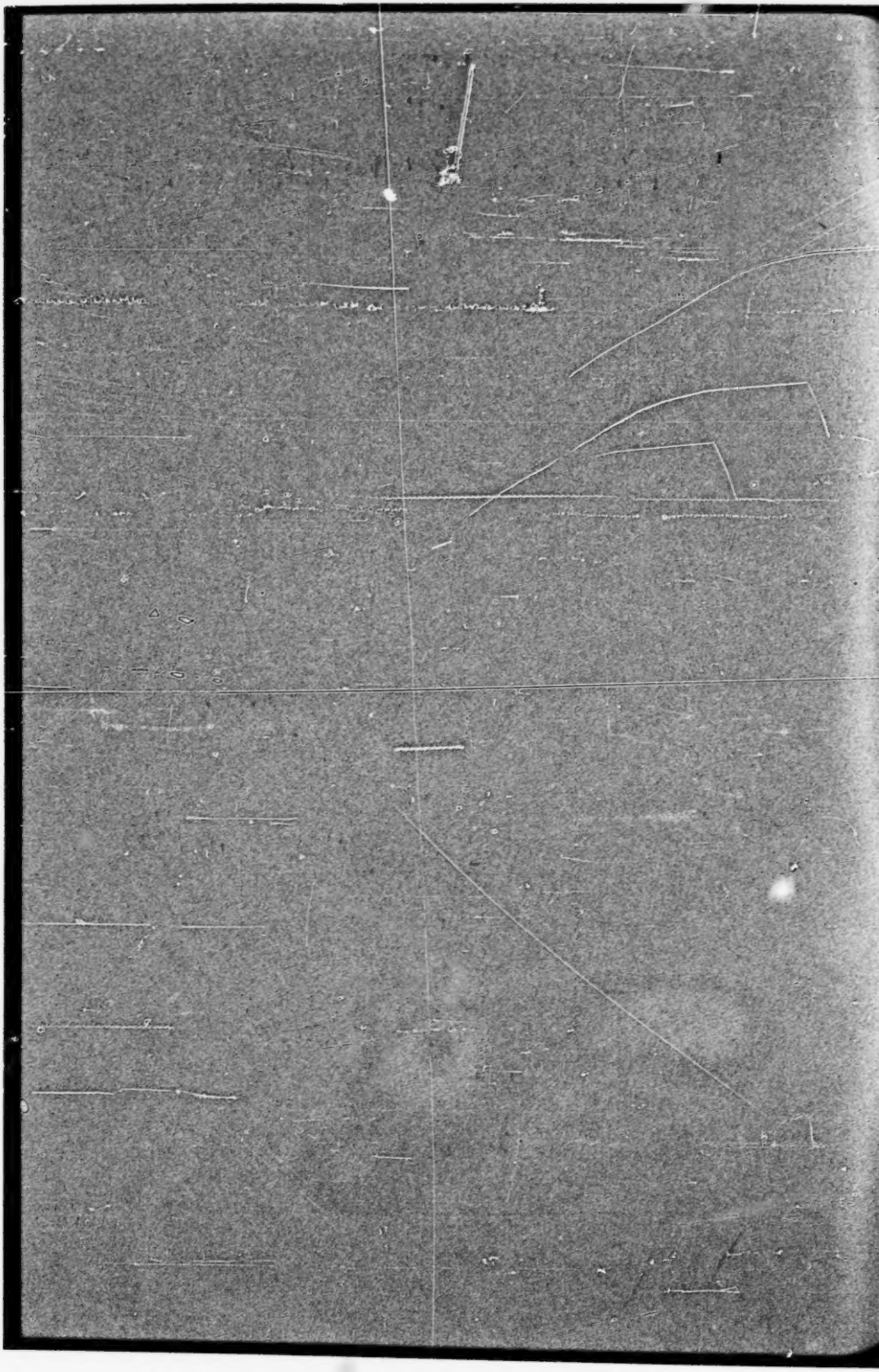

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IN THE

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CHARLES L. MOULTON and
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v.

FORD MOTOR COMPANY and
HULL-DOBBS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Tennessee entered in the appeals of the petitioners and respondents from rulings of the Court of Appeals of the State of Tennessee on March 18, 1974, and affirmed by denial of petition to rehear entered on June 17, 1974.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals was entered, but not published. The opinion of that court is attached hereto as Appendix A. The opinion of the Supreme Court of Tennessee has not yet been officially published, and is attached hereto as Appendix B. The denial of petition to rehear is attached hereto as Appendix C.

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on March 18, 1974. A petition for rehearing was denied on June 17, 1974. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(3).

QUESTION PRESENTED

Whether a plaintiff, seeking recovery of damages resulting from personal injuries received due to the failure of a defective automobile manufactured by one defendant, and sold by the other, can be denied access to the courts by interpretation of a statute of limitations so as to terminate his right to remedy prior to the occurrence of the accident which causes the injuries giving rise to the cause of action when the contrary intention of the legislature is clear.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article 1, section 17 of the Constitution of Tennessee provides:

> "Open courts--Redress of injuries--Suits against the State.--That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law,

and right and justice administered without sale, denial, or delay...."

The Fourteenth Amendment to the Constitution, sec. 1, provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Tennessee Code Annotated, sec. 28-304, was amended on April 11, 1972, as follows by House Bill No. 1599, Chapter No. 669, Public Acts of 1972:

"SECTION 1. Tennessee Code Annotated Section 28-304, is amended by deleting in its entirety the third sentence which reads as follows: 'The preceding sentence shall not apply to causes of action accruing prior to May 20, 1969.' and further amend Section 28-304 by adding to the second sentence the following words: 'and in said products cases no person shall be deprived of his right to maintain his cause of action until one (1) year from the date of his injury and under no circumstances shall his cause of action be barred before he sustains an injury.'

"SECTION 2. This Act shall take effect on becoming a law, the public welfare requiring it."

STATEMENT

The relevant facts may be briefly stated. Plaintiff, Charles Moulton, purchased a new Ford automobile from defendant, Hull-Dobbs, Inc., on April 28, 1969. Delivery of the vehicle to plaintiff was accomplished on April 30, 1969. On July 5, 1970, an accident occurred causing personal injuries to Mr. Moulton, allegedly due to a latent defect in the automobile purchased. Suit seeking recovery of damages for personal injuries to Charles Moulton, and ancillary damages due his wife, was filed on May 12, 1971, within one year from the date of the accident, but more than one year from the date of sale of the automobile to Mr. Moulton.

Defendants filed a motion for summary judgment in the trial court on July 23, 1971, which motion was granted. The grant of summary judgment was grounded upon a finding by the trial court that the cause of action was barred by the statute of limitations, which the court determined had run one year from the date of original sale of the vehicle to the plaintiffs.

On appeal to the Court of Appeals of the State of Tennessee, that court found that the applicable statute of limitations, being T.C.A., sec. 28-304, had been amended by the legislature of the State of Tennessee on May 20, 1969, and subsequently on April 11, 1972, so as to provide that such causes of action were deemed to accrue on the date of injury rather than the date of sale of the product, and that such amendment was properly applied retroactively to this cause of action.

On certiorari, the Supreme Court of the State of Tennessee reversed the judgment of the Court of Appeals, and affirmed the holding of the trial court to the effect that plaintiff's action was barred by limitations.

REASONS FOR GRANTING THE WRIT

The end result of the holdings of the Supreme Court of Tennessee is that the plaintiffs in this case, and others similarly situated, have been deprived of access to the courts of that state, and thus due process of law under the Constitution of the United States. Simply stated, the Tennessee court has ruled that the cause of action of the plaintiffs is time barred before the cause of action had matured so as to allow plaintiffs to seek redress. The holding was made in the face of a statute mandating the contrary result.

As it existed prior to the 1969 and 1972 amendments, the Tennessee statute of limitations applicable to personal injury suits read as follows; being T.C.A., sec. 28-304:

> "Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, and statutory penalties, shall be commenced within one (1) year after cause of action accrued."

In *Jackson v. General Motors Corp.*, 223 Tenn. 12, 441 S.W.2d 482 (1969); and *Bates v. Shapard*, 224 Tenn. 672, 461 S.W.2d 946 (1970), the court held that, in cases based upon a claimed defective product, the statute of limitations so provided began to run on the date of the sale of the product, not the date of personal injury to the plaintiff, and the cause of action was thus barred one year from the date of sale.

At the earliest opportunity following the decision in Jackson, the legislature of the State of Tennessee amended T.C.A., sec. 28-304. The amendment was made on May 20, 1969, and amended the section by adding the following paragraph:

> "For the purpose of this section, insofar as products liability cases are concerned, the cause of action for injury to the person shall accrue on the date of the personal injury not the date of the negligence or the sale of the product. The preceding sentence shall not apply to causes of action accruing prior to May 20, 1969."

On April 4, 1972, the General Assembly of Tennessee again amended T.C.A., sec. 28-304 by deleting in its entirety the third sentence which read as follows: "The preceding sentence shall not apply to causes of action accruing prior to May 20, 1969", and further amended the same by adding the following words:

> "and in said products cases no person shall be deprived of his right to maintain his cause of action until one (1) year from the date of his injury and under no circumstances shall his cause of action be barred before he sustains an injury."

It is thus evident that the legislature of the State of Tennessee has repeatedly expressed its dissatisfaction with the court's ruling in ***Jackson***, and has clearly expressed the legislative intent that such not be the law of the State of Tennessee as to ***any*** case.

In spite of this clear mandate from the legislature of the state, the Supreme Court of Tennessee, in this case, has held that the 1972 amendment to the statute of limitations cannot constitutionally be applied retroactively so as to breathe life into the case at bar. In so doing, the court relied on the case of ***Girdner v. Stephens***, 48 Tenn. 280 (1870). The court held that it would be unconstitutional to enact a retroactive statute of limitations reviving a cause of action "that had otherwise expired prior to the enactment of the statute."

The court refused to recognize that a subsequent decision of the same court in *East Tenn. Iron Mfg. Co. v. Gaskill*, 70 Tenn. 742 (1879), had limited the ruling of Girdner to cases where the statute "operates to vest title, or extinguish the demand." The court disposed of Gaskill with the simple statement that the limitation appeared to be dictum.

The reliance by the court on the authority of *Girdner* is grossly misplaced. In fact, the doctrine of *Girdner* has been overruled and disapproved by this Court. *Campbell v. Holt*, 115 U.S. 620 (1885); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945).

The *Girdner* opinion, *supra*, was effectively overruled by this Court in *Campbell*, *supra*. In cases dealing with a curative statute designed to lengthen a statute of limitations on causes of action which had already accrued, the Court held that a statute of limitations is merely a "remedy" and not a "right" and that a state legislature could pass a retroactive statute to extend or revive a remedy even though already barred by the prior statute. It is interesting to note that the dissenting opinion in *Campbell*, *supra*, written by Justice Bradley, cited *Girdner*, *supra*, but the Court in the majority opinion overruled the same. The decision in *Campbell*, *supra*, has been followed at least 100 times in American jurisprudence.

In subsequent opinion, the Court of Chancery Appeals of Tennessee recognized the efficacy of *Campbell v. Holt* and its thrust in the following language from *Snyder v. Brown*, 48 S.W. 377 (1898):

> "Yet the Supreme Court of the United States, speaking through one of the most imminent judges that ever wore its ermine, held that the Legislature that enacted the bar of the Statute might, after the bar had become oper-

ative in favor of the debtor, repeal it, or substitute a limitation statute that had not run in favor of the debtor."

While the Tennessee court asserts in the opinion in the case at bar that the *Girdner* case did not bottom exclusively on the Federal Constitution, such has not been its earlier opinion. In *Yancy v. Yancy*, 52 Tenn. 353, the court said in effect that the decision was made based completely upon the federal constitution, not the constitution of the State of Tennessee.

There can be no doubt that where the law or the constitution of Tennessee is in conflict with the Constitution of the United States, or the opinions of this Court construing the same, the decisions of this Court are controlling. The Supremacy Clause of the United States Constitution provides that this is the case.

In *Campbell v. Holt*, *supra*, this Court overruled state decisions based on the federal constitution which held that the federal constitution forbade retroactive suspension or revival of a statute of limitations. Thus, *Girdner* and the later case have no validity for limitations other than possible adverse possession liens. This Court, in *Campbell*, said in part:

"... The result of it is summed up in a single sentence. The rule is the Court of the United States, in respect to pleas of the statute of limitation, has always been that they strictly affect the remedy not the merits." p. 212

That the *Campbell* decision rests upon the Fourteenth Amendment to the Constitution of the United States is settled by language from *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 65 S. Ct. 1137 (1945), where this Court said:

"In Campbell v. Holt, supra, this Court held that where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar. This has long stood as a statement of the law of the Fourteenth Amendment and we agree with the Court below that its holding is applicable here and fatal to the contentions of appellant."

Further, the consistent ruling of the Tennessee courts has been to the effect that general statutes of limitation, such as here, run merely to the remedy, not to the underlying right. *McDaniel v. Mulvihill*, 196 Tenn. 41, 263 S.W.2d 759 (1953); *Hartman v. Duke*, 160 Tenn. 134, 137, 22 S.W.2d 221.

The decision of the Supreme Court of Tennessee clearly denies the plaintiffs access to the courts of that state in derogation of the Fourteenth Amendment. The limits of the scope and purpose of statutes of limitation have been long established in this country. In *Wilson v. Iseminger*, 185 U.S. 55, 22 S. Ct. 573, 575 (1902), this Court said:

"... It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action."

In *Lamb v. Powder River Live Stock Company*, 132 F. 434, 439 (1904), the 8th Circuit Court of Appeals quotes with approval the statement of a Michigan court which says:

> "It is of the essence of a law of limitations that it shall afford a reasonable time within which suit may be brought ... and a statute that fails to do this cannot possibly be sustained as a law of limitations, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law."

A general analysis of the state of the law is made in 51 Am. Jur. 2d, *Limitation of Actions*, sec. 46, p. 627, as follows:

> "... the United States Supreme Court has held that where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations even after the right of action is barred thereby, restore to plaintiff his remedy, and divest the defendant of the statutory bar."

The legislature of Tennessee has plainly and repeatedly indicated its intention to allow plaintiffs in the position of those at bar to commence an action seeking recovery of damages for personal injuries within one year from the date of injury in products liability cases. The Tennessee courts, as perforce they must, recognize that it is their duty to ascertain and give effect to legislative intent. *Beame v. Maryland Casualty Co.*, 477 S.W.2d 510; *Roberts v. Knoxville Transit Lines*, 36 Tenn. App. 595, 259 S.W.2d 883 (1952).

That the Court of Appeals for the Sixth Circuit is of opinion that the 1972 amendment to the applicable statute

of limitations applies here is established by its opinion in *Bradley v. General Motors Corporation*, (C.A. 6 Tenn. 1972) 463 F.2d 239. In *Bradley*, the District Court had entered judgment for defendants on a plea of the bar of the statute of limitations. The Court of Appeals held that where the statute of limitations pertaining to products liability was amended after summary judgment was entered on the basis of that statute, the judgment of the district court would be vacated and the case remanded for further consideration in light of the amendment. In its opinion, the Court said:

> "The cause of action, which is the subject of this appeal, arose out of injuries claimed to have been received on August 22, 1967, as a result of an alleged defect in an automobile purchased in 1963. The trial court applied section 28-304, as amended in 1969, and granted summary judgment to the defendant. Since the decision of the District Court, and on April 4, 1972, the Tennessee General Assembly enacted Public Chapter No. 669, which was approved by the Governor of Tennessee on April 11, 1972. This new statute deleted from T.C.A. Section 28-304 the sentence: 'The preceding sentence shall not apply to causes of action accruing prior to May 20, 1969,' and added to the sentence immediately preceding the above, the following words: 'and in said products cases no person shall be deprived of his right to maintain his cause of action until One (1) year from the date of his injury and under no circumstances shall his cause of action be barred before he sustains an injury.' *The 1972 Amendment was given immediate effect.*" (Emphasis supplied)

CONCLUSION

It is unthinkable that the Constitution of the United States will grant leave to the courts of the nation to refuse to properly carry out the mandate of the legislature in areas of proper concern to the legislative bodies of the various states in situations where to do so is to deny to litigants their right to due process of law and access to the courts for redress of injuries. The holding of the Supreme Court of Tennessee is erroneous, and is a total misconception of the thrust of the due process clause of the Fourteenth Amendment. For the reasons set forth, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

[fol. 1]

IN THE COURT OF APPEALS OF TENNESSEE EASTERN SECTION

CHARLES L. MOULTON and PAULINE M. MOULTON, Appellants -vs- FORD MOTOR COMPANY and HULL-DOBBS Appellees	FROM THE CIRCUIT COURT FOR KNOW COUNTY HON. JAMES M. HAYNES, JUDGE

PAUL T. GILLENWATER and SUMTER D. FERGUSON OF KNOXVILLE FOR APPELLANTS

LOUIS C. WOOLF OF KNOXVILLE FOR FORD MOTOR COMPANY

STUART F. DYE and HUGH W. MORGAN OF KNOXVILLE FOR HULL-DOBBS

OPINION

(Filed May 25, 1973)

Parrott, J.

This is a suit for damages for personal injuries allegedly resulting from a defect in an automobile's steering mechanism.

Plaintiffs' appeal is from the circuit judge's orders sustaining defendant's, Ford Motor Company, motion to dismiss and/or summary judgment and sustaining defendant's, Hull-Dobbs, motion for summary judgment.

Originally this appeal was to the Supreme Court and that court transferred the case to this court under the authority of Allstate Insurance Co. v. Hartford Accident & Indemnity Co., 483 S.W.2d 719, which holds an appeal on an order sustaining a motion for summary judgment which involves determination of evidentiary matters lies in the Court of Appeals.

[fol. 2] Before reviewing the matters arising in the court below, we have for consideration defendant's motion to dismiss this appeal because of the form of the record. In this court we have the technical record but no bill of exceptions. It is defendant's contention that the affidavits and deposition introduced at the hearing on the motion for summary judgment should be incorporated in the bill of exceptions for the same to be reviewable in this court.

On April 17, 1973, this court amended its rules by adding Rule 7(a) which provides in part that all pleadings, depositions, answers to interrogatories, affidavits, exhibits, admissions and stipulations filed with the clerk of the trial court before hearing on a motion for summary judgment shall be considered part of the technical record for the purpose of appeal without the necessity of authentication or certification by the trial judge or including such in a bill of exceptions. See Rules, 491 S.W.2d LV-LVI. This amendment to the rules meets the objections raised in defendant's motion to dismiss. Therefore, the motion is overruled.

Defendant, Ford Motor Company, has also filed a motion to dismiss on the ground this appeal as to it is premature. On August 16, 1971, the trial court entered its order sustaining the defendant's, Ford Motor Company, motion for summary judgment. An order sustaining de-

fendant's, Hull-Dobbs, motion was not entered until November 17, 1971. Ford Motor Company contends the appeal as to it from the August 16 order should not be permitted under T.C.A. 27-305. It is true Sec. 27-305 does not permit interlocutory appeals in law cases. Notwithstanding the statute, since both motions are now before this court on separate orders, we see no good reason, purpose or logic in remanding the case as to the defendant, Ford Motor Company. Accordingly, the motions to dismiss are overruled.

[fol. 3] Turning now to what occurred in the court below, plaintiff, Charles Moulton, filed a complaint on May 13, 1971, averring he purchased from defendant, Hull-Dobbs of Knoxville, a 1969 Ford LTD automobile which was delivered to him on April 30, 1969. That on July 5, 1970, while driving in a westerly direction along Interstate-40, the car suddenly veered to the right, jumped a guard rail and fell 26 feet to a street below. It is alleged the car suddenly went out of control because of a defect in the steering mechanism. In the accident Moulton was seriously and painfully injured.

Charles L. Moulton, in his suit, seeks One Million Dollars in damages and charges the defendants with: (1) negligence; (2) breach of express and implied warranties; (3) tortious misrepresentation based on public advertisement; and (4) strict liability in tort.

Plaintiff, Pauline M. Moulton, wife of Charles Moulton, adopts the same facts and theories of recovery in her suit for $100,000 for loss of consortium.

To the plaintiffs' complaint defendants filed the aforesaid motions for summary judgment and/or dismissal alleging that the statute of limitations had run. Additionally

they alleged lack of privity and disclaimer or limitation of liability.

On these motions the trial judge entered separate orders stating: "Said motion is well taken and should be sustained." The orders went further and dismissed the plaintiff's suit.

First we will consider the plaintiff's charges of breach of warranties. Plaintiff, Charles Moulton, alleges that defendant, Hull-Dobbs, breached express and implied warranties of fitness and merchantability in selling him a defective automobile. There is no indication that any express warranty was made by Hull-Dobbs to Mr. Moulton. The retail buyer's order and motor vehicle sales contract, which Mr. Moulton admits in his deposition that he signed with Hull-Dobbs, both state that there are no
[fol. 4] express warranties made by Hull-Dobbs regarding the automobile. Moreover, plaintiff's deposition indicates that he understood the express warranty he received on the car was from Ford Motor Company, not from Hull-Dobbs.

The retail buyer's order and motor vehicle sales contract also disclaim all implied warranties. Plaintiff asserts that this disclaimer is invalid since T.C.A. 47-2-719 "expressly prohibits exclusion of personal injuries by warranty." However, plaintiff misconstrues the scope of this section. Subsection (3) thereof provides that limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable, but that section does not control disclaimers of implied warranties. Official Comment 3 to T.C.A. 47-2-719 states that the seller "in all cases is free to disclaim warranties in the manner provided in Section 2-316."

The latter section, which is T.C.A. 47-2-316, provides in subsection (2) that implied warranties of merchantability and fitness may be disclaimed if the disclaimer is conspicuous and mentions merchantability, and if it is in writing with reference to the fitness warranty. The disclaimer here is in writing, and merchantability is explicitly mentioned in the disclaimer of the motor vehicle sales contract.

The term "conspicuous" is defined in T.C.A. 47-1-201(10), which provides that whether a term is conspicuous "is for decision by the court." We do not believe the disclaimer in the retail buyer's order is conspicuous, since it is not in larger or other contrasting type or color. Nor does it mention merchantability. On the other hand, the trial court could reasonably find that the disclaimer in the motor vehicle sales contract meets the requirements of T.C.A. 47-2-316(2). It mentions merchantability, it is on the face of the contract, in slightly bolder type near the top of the page, and is set off from the rest of the contract by horizontal lines.

[fol. 5] Since we find that plaintiff, Charles Moulton, has no cause of action for breach of warranty against Hull-Dobbs, due to the disclaimer clause in the motor vehicle sales contract, we also conclude that plaintiff, Pauline Moulton, has no such action against this defendant. The Supreme Court of this State held in Hargrove v. Newsome, ___ Tenn. ___, 470 S.W.2d 348 (1971), that privity of contract is required for an action in warranty under Article Two of the Uniform Commercial Code (T.C.A. Title 47, Chp. 2), except in those cases where privity is dispensed with by T.C.A. 47-2-318. The latter section provides that a seller's express or implied warranty to his buyer also extends to members of the family or household, or guests in the home, of the buyer, where such person

foreseeably suffers personal injury as a result of breach of the warranty. While it is clear that Mrs. Moulton is a member of the buyer's family, her action being derivative, she is entitled to no greater warranty rights under this section than the buyer himself. Since Mr. Moulton has no warranty rights against defendant, Hull-Dobbs, because of the disclaimer, neither does Mrs. Moulton. In view of this conclusion, we need not reach the question of whether the injuries suffered by Mrs. Moulton [loss of consortium] are personal injuries within the meaning of T.C.A. 47-2-318.

Mrs. Moulton contends that T.C.A. 25-109, which creates a cause of action in the wife for loss of consortium, also inferentially dispenses with privity when the wife brings an action for loss of consortium based on breach of warranty. We do not read the statute as affecting the requirement of privity in a warranty action.

Mrs. Moulton further contends she has a warranty action against defendant, Hull-Dobbs, under the recent statute passed by the General Assembly on April 10, 1972, after this case was appealed. That statute, T.C.A. 23-3004,

[fol. 6] provides: "In all causes of action for personal injury or property damage brought on account of negligence, strict liability or breach of warranty, including actions brought under the provisions of the Uniform Commercial Code, privity shall not be a requirement to maintain said action." Both plaintiffs contend this statute provides them with a cause of action in warranty against defendant, Ford Motor Company, with whom neither plaintiff is in privity.

Whether the statute creates any causes of action in warranty, not otherwise existing prior to its passage, raises very difficult questions of statutory construction. Never-

theless, we need not resolve those questions in this case since we find that the statute has no application to the present case.

It is a well-accepted principle of statutory construction that statutes have only prospective application, unless the legislative intent that they be given retrospective application is clearly shown. Taylor v. Rountree, 83 Tenn. (15 Lea) 725 (1885). In the present case there is nothing on the face of the statute to indicate that it is to be applied restrospectively, and accordingly, we hold that it has only prospective application. Applying the rule laid down in Bates v. Shapard, 224 Tenn. 672, 461 S.W.2d 946 (1970), dealing with prospective application of an amendment to the statute of limitations affecting actions arising in connection with the sale of goods, we find that T.C.A. 23-3004 is intended to apply only to sales occurring after the effective date of the statute. Therefore, the statute has no application to the present case.

Plaintiff, Charles Moulton, contends that he has an action against Ford Motor Company based on breach of express warranty. The evidence establishes that Ford Motor Company gave an express warranty directly to the ultimate purchaser of the car. It has been held that an action may be maintained on such a warranty in the absence of
[fol. 7] privity. Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y. 2d 5, 226 N.Y.S. 2d 363, 181 N.E.2d 399 (1962); Seely v. White Motor Co., 63 Cal. 2d 9, 45 Cal. 17, 403 P.2d 145 (1965). It is undisputed, however, that this express warranty, insofar as the allegedly defective part or parts in the present case are concerned, was for the first twelve months or 12,000 miles of operation, whichever first occurs, and that the car in question had been operated in excess of 30,000 miles when the accident occurred.

Plaintiffs contend that the one year or 12,000 mile limitation on the express warranty is prima facie unconscionable under T.C.A. 47-2-719(3). This provision has to do with limitation of remedies, and not with a limitation on the time within which a claim may be asserted. T.C.A. 47-2-607(3)(a) provides for the time within which a claim must be asserted. It states that where goods have been accepted, "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of the breach or be barred from any remedy." T.C.A. 47-1-204(1) provides that whenever any provision in the sales act requires an action to be taken within a reasonable time, "any time which is not manifestly unreasonable may be fixed by agreement."

Limitation of the period of the express warranty is in effect a limitation of the time within which a claim must be asserted under that warranty. The warranty actually provides for repair or replacement of certain parts "found to be defective" within the limited period, and if such discovery were made presumably a further reasonable period of time would be allowed for giving notice. Here, however, no such discovery within the limited period was made. Thus, plaintiff has no valid claim of breach of express or implied warranty.

There is no assignment of error that the limited period of the express warranty is "manifestly unreasonable," within the meaning of T.C.A. 47-1-204(1). In
[fol. 8] the absence of any such assignment, we deem the issue waived by plaintiffs.

The foregoing disposes of plaintiffs' claims against defendants for breach of warranty. As noted earlier, plaintiffs also assert claims against both defendants in negligence, strict tort liability, and tortious public misrepresentation.

These claims were dismissed by the trial court based on a defense that the applicable statute of limitations had run. The trial court's action was correct, except as to the property damage claim, based on applicable law at the time when the issue was decided by the trial court. Due to intervening statutory change in the applicable law, we conclude that this case must be reversed and remanded for trial on the above theories of recovery.

With regard to the defense of disclaimer and limitation of liability, it is settled law that such defenses are ineffective to bar an action in strict tort. See Vandermark v. Ford Motor Co., 61 Cal.2d 256, 37 Cal. Rptr. 896, 391P.2d 168 (1964); comment m to sec. 402A, and comment d to sec. 402B, Restatement of Torts Second. Such defenses are also ineffective as a bar to a claim in negligence, unless it is unequivocally clear that liability for negligence is in fact being disclaimed or limited. Willard Van Dyke Productions, Inc. v. Eastman Kodak Co., 12 N.Y.2d 301, 239 N.Y.S. 2d 337, 189 N.E.2d 693 (1963). We find that the disclaimer and limitation of liability in the present case do not meet this standard of clarity, and are therefore ineffective with reference to plaintiffs' negligence claims.

The applicable period of limitations for a cause of action for breach of warranty is four years from the date of delivery of the goods, under T.C.A. 47-2-725. Layman v. Keller Ladders, Inc., 224 Tenn. 396, 455 S.W.2d 594 (1970). This statute would be applicable to plaintiffs' warranty claims, were they not otherwise barred by lack of privity, disclaimer and limitation of liability.

[fol. 9]

The period of time applicable to claims for personal injuries based on negligence, strict tort liability and tor-

tious misrepresentation is one year from the date of sale, under T.C.A. 28-304. Jackson v. General Motors Corp., 223 Tenn. 12, 441 S.W.2d 482 (1969). Such claims for property damage to plaintiff, Charles Moulton's automobile would run for three years from the date of sale under T.C.A. 28-305. Accordingly, the trial court erred in holding the property damage claims barred by the statute, since this damage occurred within three years of the date of sale.

We need not decide whether plaintiff Pauline Moulton's claims in tort for loss of consortium are personal injury or property damage claims, since for the reasons stated hereafter we find that her claims would not be barred under either the three year or the one year statute. We note in passing, however, that it seems more likely that the one year statute would apply to tort claims for loss of consortium under T.C.A. 25-109 since it has been held that this statute applies to analogous tort claims against a third party for alienation of a spouse's affections. Scates v. Nailling, 196 Tenn. 508, 268 S.W.2d 561 (1954); Nabors v. Keaton, 216 Tenn. 637, 393 S.W.2d 332 (1965).

Concerning personal injury claims in tort, some history regarding the applicable statute of limitations is required. After the Jackson decision was rendered, the result was criticized as unsound. See Note, 36 Tenn. L. Rev. 416-21 (1969). The General Assembly promptly expressed its disapproval by passing an amendment to T.C.A. 28-304 providing that the period of limitation for personal injuries in "products liability cases" should be for one year commencing with the date of injury, rather than the date of negligence or sale of the product. This amend-
[fol. 10] ment was made prospective from the date of passage, which was May 20, 1969. In Bates v. Shapard, 224 Tenn. 672, 451 S.W.2d 946 (1970), the Su-

preme Court of this State held that the 1969 amendment to T.C.A. 28-304 applied only to sales occurring on or after the effective date of the amendment. For sales occurring prior to that date, the Jackson decision still applied.

In 1972 the General Assembly again amended T.C.A. 28-304 to provide that "in said products cases no person shall be deprived of his right to maintain his cause of action until one (1) year from the date of his injury and under no circumstances shall his cause of action be barred before he sustains an injury." Although this second amendment was not passed until April 11, 1972, after the present case had been appealed, it is clear that the amendment is intended to be retroactive in effect. Thus, it would apply to the present case to sustain plaintiffs' causes of action in tort for personal injuries, since this suit was filed on May 13, 1971, within one year of the date of injury, which was July 5, 1970.

Defendants contend that such a retroactive amendment is unconstitutional, citing Girdner v. Stephens, 48 Tenn. 280 (1870), and Henderson v. Ford, 488 S.W.2d 720 (Tenn. 1972). We do not believe that these cases are controlling for the reasons hereafter stated. There is a division of authority as to whether such a retroactive statute is unconstitutional. We are not required to choose solely on the basis of what we believe to be the better rule within this division, however, because we find that the rule in Tennessee is already controlled by law.

The Henderson case presented the issue of whether a February 12, 1970 amendment to the Tennessee Non-Resident Motorist Act, T.C.A. 20-224, "had the effect of reviving an agency in the Secretary of State which had expired according to the terms of the original act on January 17, 1970." The Court held that the agency was not so revived,

since it is "the rule that statutes do not operate
[fol. 11] retroactively, unless this is so provided therein."
The Court also noted that such retroactivity would have the effect of reviving "an agency which had expired, thereby exposing Ford to the hazards, inconvenience and expense of a lawsuit in a foreign state, and so disturb his vested right to be free therefrom, at least by reason of that particular agency."

The Henderson case may be readily distinguished from the present case. The amendment to the statute in that case was not clearly intended to be retroactive, and under well accepted rules of statutory construction, as already noted, the amendment should therefore be construed as prospective in effect. In the present case, the amendment is clearly intended to be retroactive, so the rule of construction is inapplicable.

Even read as a statement that a statute may not be construed as retroactive so as to impair vested rights, the Henderson case does not control the present case. There the Court was concerned with retroactively changing vested rights arising from an agency relationship, and the result may be explained under principles of agency law prohibiting the impairment of contracts. Moreover, the Court in that case did not have the constitutional question before it as here.

The precise question now before this Court was presented in Girdner v. Stephens, 48 Tenn. 280 (1870). There the Court decided that it would be unconstitutional to enact a retroactive statute of limitations reviving a cause of action that had otherwise expired prior to the enactment. The rule in Girdner was limited in East Tenn. Iron Mfg. Co. v. Gaskell, 70 Tenn. 742, 749 (1879), to cases where the retroactive statute "operates to vest titles, or to ex-

tinguish the demand." In the present case, no title is vested and no demand is extinguished by the 1972 amendment to T.C.A. 28-304.

[fol. 12] In any event, the Girdner case has been overruled and is no longer the law in Tennessee since that case is based solely on federal constitutional grounds and the United States Supreme Court, which is the final arbiter of federal constitutional questions, has since upheld the constitutionality of retroactive legislation regarding statutes of limitations. Campbell v. Holt, 115 U.S. 620 (1885); Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945).

That Girdner is based on federal constitutional grounds may be determined from the fact that the period of limitations in that case was revived both by statute and by amendment to the Constitution of Tennessee. Since the constitutionality of a provision of the State Constitution was in issue, the constitutional attack necessarily was on federal constitutional grounds.

The Tennessee Supreme Court has held that the scope of the applicable state constitutional provisions regarding retrospective laws, impairment of contracts, vested rights and due process of law, is controlled by the comparable federal constitutional provisions. Art. 1, sec. 20 of the Tennessee Constitution prohibits retrospective laws and laws impairing the obligation of contracts, and Art. 1, sec. 8 provides that no person may be deprived of life, liberty or property "but by the judgment of his peers or the law of the land." In Lake County v. Morris, 160 Tenn. 619, 628, 629, 28 S.W.2d 351, 354 (1930), the Court held: "The provision of the Constitution of the State and the provision of the Constitution of the United States with respect to laws impairing the obligation of contracts are identical

so that any question of the validity of a statute in this particular is a federal question and the decisions of the Supreme Court of the United States are controlling." In Paine v. Fox, 172 Tenn. 290, 298, 112 S.W.2d 1, 4 (1937), the Court held that the "Supreme Court of the United States is the final arbiter of questions involving contract, retrospective law, due process and equal protection provisions contained in both State and Federal Constitutions . . . ."

[fol. 13]

Viewed as a matter of policy, there is no unfair disturbance of vested rights in upholding the constitutionality of the 1972 amendment to T.C.A. 28-304. The reason for applying the vested-rights rationale to strike down retroactive legislation as unconstitutional is because such retroactivity is unreasonable when applied to a particular situation. Not all retroactive legislation is unconstitutional, but only that which deprives a person of his reasonable expectations under prior law.

The policy of statutes of limitations is one of repose, but defendants cannot complain that their repose is unfairly disturbed by the 1972 amendment to T.C.A. 28-304 since there is no clear assurance of such repose even under the law as it existed prior to the 1972 amendment. It would be one thing if under preexisting law defendants could be assured that no cause of action in Tennessee would be filed under T.C.A. 28-304 based on any sale of goods occurring prior to May 20, 1969, where a year had elapsed from the date of such sale. But there is no such assurance.

Dobbins v. Terrazzo Machine & Supply Co., 479 S.W. 2d 806 (Tenn. 1972), held that, due to the language of T.C.A. 50-914, a cause of action in tort may be brought within one year of the date of injury by an employee against the seller of a product, for personal injuries received dur-

ing the course of employment and caused by a defect in the product. Therefore, whenever by chance the plaintiff is an employee, there may be no repose under T.C.A. 28-304. Bates v. Shapard, 224 Tenn. 672, 451 S.W.2d 946 (1970), which construed the 1969 amendment to T.C.A. 28-304 to apply prospectively, held that the last date of sale, rather than the date of original sale by the defendant, is the controlling date for purposes of determining whether the 1969 amendment applies. Therefore, there is no repose with regard to a sale occurring prior to
[fol. 14] May 20, 1969, since there is always a possibility that the product will be resold in the distributive chain after the effective date of the 1969 amendment thereby making that amendment applicable to the sale. There is, accordingly, no unreasonableness in applying the 1972 amendment retroactively since such application merely brings the case law into full conformity with the sound policies expressed in the Dobbins and Bates decisions and with the legislative intent expressed in both the 1969 and 1972 amendments. Such retroactive application is also within the permissible scope of constitutional limitations under both the state and federal constitutions.

It results the trial judge's action in sustaining a dismissal of plaintiff's suit for personal injuries and loss of consortium based on the grounds of breach of warranty, both expressed and implied, is affirmed, but as to the dismissal of plaintiff's action on the grounds of negligence, strict tort liability and tortious public misrepresentations, is reversed. Also the dismissal of the property damage claim is reversed. The cause is remanded for further proceedings consistent with this opinion.

Let the costs incident to this appeal be equally divided among the plaintiffs and defendants.

James W. Parrott, Jr.

CONCUR:

Robert E. Cooper, P.J.(E.S.)

Clifford E. Sanders, J.

APPENDIX "B"

[fol. 1]

FORD MOTOR COMPANY, ET AL., *Petitioners*,	KNOX LAW
VS	
CHARLES MOULTON, ET UX., *Respondents*.	HONORABLE JAMES M. HAYNES, JUDGE.

FOR PETITIONERS:

LOUIS C. WOOLF, KNOXVILLE, TENNESSEE, FOR FORD MOTOR COMPANY.

STUART F. DYE AND HUGH W. MORGAN, KNOXVILLE, TENNESSEE, FOR HULL-DOBBS.

FOR RESPONDENTS:

PAUL T. GILLENWATER AND SUMTER D. FERGUSON, KNOXVILLE, TENNESSEE

OPINION

(Filed March 18, 1974)

This is a personal injury suit brought by Moulton and his wife, Pauline, against Ford Motor Company and a retail Ford dealer, Hull-Dobbs.

Moulton seeks $1,000,000.00 in damages and charges the defendants with: negligence; breach of express and implied warranties; tortious misrepresentation based on public advertisement; and strict liability in tort.

Moulton filed a complaint on May 13, 1971, averring he purchased from Hull-Dobbs of Knoxville a 1969 Ford LTD automobile which was delivered to him on April 30, 1969.

[fol. 2] That on July 5, 1970, while driving in a westerly direction along Interstate 40, the car suddenly veered to the right, jumped the guard rail and fell twenty-six feet to a street below. It is alleged the car suddenly went out of control because of a defect in the steering mechanism. Moulton was seriously injured.

Mrs. Moulton adopts the same facts and theories for recovery in her suit for loss of consortium.

Motions for summary judgment or dismissal were filed by both petitioners. The trial judge concluded the complaint did not state a cause of action for breach of warranty. He sustained petitioners' motion as to the warranty counts. He, also, held the counts sounding in negligence, strict liability in tort, and tortious misrepresentation based on public advertisement were barred by the statute of limitations.

The Court of Appeals affirmed the action of the trial judge in dismissing the breach of warranty counts, but reversed as to the other counts after concluding that they were not barred by the statute of limitations.

All parties petitioned this Court for the writ of certiorari to the Court of Appeals. We granted the petitions of petitioners and denied the petitions of respondents.

We think it proper for us to first point out the reasons for our denial of respondents' petitions for certiorari.

Although respondents raised numerous assignments of error, it is unnecessary to discuss each assignment of error separately since they all relate basically to two issues.

[fol. 3] The Court of Appeals concluded that Hull-Dobbs had not given Moulton an express warranty. This conclusion is supported by the evidence. That Court found that Ford had given Moulton a one-year or twelve thousand mile express warranty. However, the Court of Appeals held that this warranty had expired, thereby precluding an action for its breach.

Both Hull-Dobbs and Ford had disclaimer clauses in their contracts with Moulton, which purportedly disclaimed all implied warranties. The Court of Appeals found these disclaimer clauses to be valid; and, therefore, sufficient to prevent respondents from having a cause of action for breach of implied warranty.

Respondents make three arguments: First, they insist the disclaimer clauses were not properly drawn in that they failed to comply with the provisions of the Uniform Commercial Code; and are, therefore, invalid. Second, if the disclaimer clauses are properly drawn, they are prima facie unconscionable under T.C.A. 47-2-715. Finally, respondents insist that the one-year or twelve thousand mile limitation on the express warranty is prima facie unconscionable under T.C.A. 47-2-719.

T.C.A. 47-2-316(2) provides that implied warranties of merchantability and fitness may be disclaimed if the disclaimer is conspicious and mentions merchantability, and if it is in writing with reference to the fitness warranty. The Court of Appeals concluded that the requirement of T.C.A. 47-2-316(2) had been complied with; and, consequently, the disclaimers were validly drawn. We agree with this conclusion.

[fol. 4] Respondents insist that even if the disclaimers were drawn in accordance with the provisions

of T.C.A. 47-2-316 they are, nevertheless, invalid because they violate T.C.A. 47-2-719.

T.C.A. 47-2-719(3) provides:

> "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."

Respondents' argument is that as a result of the accident Moulton sustained personal injuries; that because of the valid disclaimer of warranties, he is unable to bring an action for consequential damages resulting from the accident; and that such an exclusion is violative of T.C.A. 47-2-719(3) since that section "expressly prohibits exclusion of personal injuries by warranty."

In answer to this argument, the Court of Appeals said:

> "---Plaintiff misconstrues the scope of this Section. (2-719(3)). Subsection (3) thereof provides the limitation of consequential damages for injury to the person in case of consumer goods is prima facie unconscionable, but that Section does not control disclaimer of implied warranties. Official comment 3 to T.C.A. 47-2-719 states that the seller 'in all cases is free to disclaim warranties in the manner provided in Section 2-316.'
>
> "The latter Section, which is T.C.A. 47-2-316, provides in subsection (2) that implied warranties of merchantability and fitness may be disclaimed if the disclaimer is conspicious and mentions merchantability, and if it is in writing with reference to the fitness warranty. The disclaimer here is in writing, and mer-

chantability is explicitly mentioned in the disclaimer of the motor vehicle sales contract."

[fol. 5] Most Uniform Commercial Code commentaries agree with the conclusion of the Court of Appeals that disclaimers drawn in accordance with 47-2-316 cannot be considered to violate the provisions of 47-2-719. The following analysis is offered in the one volume treatise of the U.C.C. by White and Summers:

"----The proposition enunciated by - - - (a few courts) - - - that a disclaimer that has the effect of modifying or excluding consequential damages may be unconscionable under 2-719(3) ---- is out of line with the scheme of the Code. Comment 3 to 2-719(3) provides: - - - 'Subsection (3) recognizes the validity to clauses limiting or excluding consequential damages but makes it clear that they may not operate in an unconscionable manner. Actually such terms are merely an allocation of unknown or undeterminable risks. The seller in all cases is free to disclaim warranties in a manner provided in Section 2-316.'

"The last sentence seems to be telling the seller, 'if you really want to limit your liability why don't you disclaim all warranties? Then you won't have to worry about limiting damages.' Note that the sentence appears after the discussion of remedies limitations and after the discussion of extent to which such clauses are governed by the unconscionability doctrine and that it announces that the seller may disclaim warranties in all cases. These facts strongly indicate that the draftsmen intended for 2-316 to operate independently of 2-719(3).

"This implication is buttressed by comment to 2-316 - - -: '- - - If no warranty exists, there is of course no problem of limiting remedies for breach of warranty.'

"The comment's reasoning is elementary: there can be no consequential damages if there is no breach; there can be no breach of warranty if there is no warranty; there can be no warranty if the seller has disclaimed them pursuant to 2-316. Although a particular disclaimer may be unconscionable under 2-302, it seems clear that the scheme of the Code does not permit a court to disregard that disclaimer on the basis that it operates to exclude the consequential damages that could not be excluded under 2-719(3)."

[fol. 6] We think the Court of Appeals correctly determined that the disclaimer clauses did not violate the provisions of 2-719(3).

Respondents did not argue that the Court of Appeals did not consider the question as to whether a warranty disclaimer which meets the provisions of 2-316 can be considered unconscionable within the meaning of the term as used in 2-302. Most commentaries answer this question in the negative. See Leff Unconscionability and the Code, the Emperor's New Clause, 115 U. Pa. L. Rev., 485 (1967).

Finally, respondents contend that the one-year or twelve thousand mile limitation on the express warranty is prima facie unconscionable under T.C.A. 47-2-719(3). This is essentially the same argument made above. Again, the Court of Appeals rejected respondents' reasoning stating:

"This provision has to do with limitation or remedies, and not with a limitation on the time within which a claim may be asserted. T.C.A. 47-2-607(3)(a) provides for the time within which a claim must be asserted. It states that where goods have been accepted, 'the buyer must within a reasonable time after he discovers or should have discovered a breach notify the seller of the

breach or be barred from any remedy.' T.C.A. 47-1-204(1) provides that whenever any provision in the Sales Act requires an action to be taken within a reasonable time 'any time which is not manifestly unreasonable may be fixed by agreement.'

"Limitation of the period of the express warranty is in effect a limitation of the time within which a claim must be asserted under that warranty. The warranty actually provides for repair or replacement of such parts 'found to be defective' within the limited period and if such discovery were made presumably a further reasonable period of time would be allowed for giving notice. Here, however, no such discovery within the limited period was made. Thus, plaintiff has no valid claim of breach of express or implied warranty.

[fol. 7] "There is no assignment of error that the limited period of express warranty is 'manifestly unreasonable' within the meaning of T.C.A. 47-1-204(1). In the absence of any such assignment, we deem the issue waived by the plaintiffs."

The Court of Appeals, also, rejected Mrs. Moulton's contention that she had a breach of warranty action stating: "- - - her action being derivative, she is entitled to no greater warranty rights under this Section than the buyer himself. Since Mr. Moulton has no warranty rights ---- neither does Mrs. Moulton."

We agree with the foregoing conclusions of the Court of Appeals.

Petitioners in their petition raise two issues:

First, they insist that the Court of Appeals erred by considering affidavits and depositions which were made a

part of the technical record but not spread upon the court's minutes nor otherwise authenticated by the trial judge.

In response to this contention, the Court of Appeals said:

> "On April 17, 1973, this Court amended its rules, adding Rule 7(a) which provides in part that all pleadings, depositions, answers to interrogatories, affidavits, exhibits, admissions and stipulations filed with the clerk of the trial court before hearing on a motion for summary judgment shall be considered part of the technical record for the purpose of appeal without the necessity of authentication or certification by the trial judge or including such in a bill of exceptions."

The Court of Appeals could have considered the deposition without resorting to its new rules as authority. T.C.A. Section 27-104. That Section only applies to depositions and exhibits. The Court of Appeals could not consider the affidavits or stipulations unless they [fol. 8] were authenticated by the trial judge either by minute entry or by inclusion in a bill of exceptions. Bryant vs. Central Motor Co., 218 Tenn. 542, 404 S.W. (2d) 513 (1966); Southern Fdy. Supply vs. Spang & Co., 225 Tenn. 447, 470 S.W. (2d) 187 (1971).

Although the Court of Appeals had the power to modify its rules they must not conflict with the rules of procedure of this Court. T.C.A. 16-117.

We are of the opinion that the amended Rule 7(a) conflicts, at least in part, with the substantive law which this Court is bound to follow until it is directly overruled. For instance, in Bryant vs. Central Motor Express, supra, this Court held that stipulations of fact must be contained in a bill of exceptions or through the minutes of the Court

which the trial judge authenticates if they are to be considered by this Court. Thus, the anomalous situation is created whereby the Court of Appeals could consider a stipulation but this Court reviewing the same case could not.

However, the record reveals the trial judge personally authenticated the affidavits and exhibits thereto and also the deposition of Mr. Moulton. In his order dismissing the suit, he specifically identified the affidavits, exhibits thereto, and the depositions as having been considered in arriving at his decision. Thus, the rule in Bryant vs. Central Motor Co., supra, was complied with. We overrule this assignment of error.

In their second assignment of error, the petitioners contend that the Court of Appeals erred in applying T.C.A. Section 28-304 retroactively because such construction of T.C.A. 28-304 had the effect of reviving an otherwise barred cause of action.

[fol. 9] T.C.A. Section 28-304 was amended in 1972 as follows:

> "-----In said Products cases no person shall be deprived of his right to maintain his cause of action until one (1) year from the date of his injury and under no circumstances shall his cause of action be barred before he sustains an injury."

This amendment took effect April 11, 1972.

The petitioners insist that under the decisions of this Court, Jackson vs. General Motors Corp., 223 Tenn. 12, 441 S.W. (2d) 482 (1969); and Bates vs. Shapard, 224 Tenn. 672, 461 S.W. (2d) 946 (1970); that the statute of limitations ran on April 30, 1970, because Moulton had

purchased the car on April 30, 1969, and the complaint filed on May 13, 1971, was barred.

Prior to the effective date of the above quoted amendment to T.C.A. Section 28-304, it was the law of this State that a cause of action of a purchaser against an automobile manufacturer for negligence in the manufacture of an automobile accrued on the date the purchaser bought the car from the manufacturer's dealer. Jackson vs. General Motors Corp., supra, Bates vs. Shapard, supra.

Petitioners contend to construe T.C.A. Section 28-304 as amended as reviving this otherwise barred cause of action violates the constitution of this State. We agree.

This precise question was presented in Girdner vs. Stephens, 48 Tenn. 280 (1870).

[fol. 10] The Court held it to be unconstitutional to enact a retroactive statute of limitations reviving a cause of action that had otherwise expired prior to the enactment of the statute. The Court reasoned such action would deprive the person relying on the statute of a vested right; and, therefore, unconstitutional.

Furthermore, in the case of Henderson vs. Ford, ___ Tenn. ___, 488 S.W. (2d) 720 (1972), this Court held an amendment lengthening the time for the Secretary of State to accept service of process on behalf of a nonresident motorist could not be given a retroactive effect after the original period of time had expired.

The Court specifically said:

"So the issue is, in essence, whether the application of the 1970 amendment to the defendant-in-error would impair any such right vested in him at the time of the enactment of the amendment. And the answer must be

that such an application of the statute would recreate, or revive, an agency which had expired, thereby exposing Ford to the hazards, inconvenience and expense of a lawsuit in a foreign state, and so disturb his vested right to be free therefrom, at least by reason of that particular agency."

The Court of Appeals noted that the rule in Girdner was limited to East Tenn. Iron Mfg. Co. vs. Gaskill, 70 Tenn. 742 (1879), to cases where the retroactive statute "operates to vest title, or extinguish the demand." However, such a limitation of the rule of Girdner appears to be dictum.

The Court of Appeals reasoned that even if the Girdner case had not been modified or overruled by the Tennessee courts it has been overruled by the United States Supreme Court. The Court said:

[fol. 11] "----The Girdner case has been overruled and is no longer the law in Tennessee since that case is based solely on federal constitutional grounds and the United States Supreme Court, which is a final aribter of federal constitutional questions, has since upheld the constitutionality of retroactive legislation regarding statutes of limitations. Campbell vs. Holt, 115 U.S. 620 (1885); Chase Securities Corp. vs. Donaldson, 325 U.S. 304 (1945)."

We disagree with this reasoning for two reasons. First, the Girdner case is not based solely on federal constitutional grounds. The U. S. Supreme Court cases cited merely hold that retroactive legislation did not violate the Fourteenth Amendment to the Constitution of the United States.

Secondly, we do not understand that those cases prevent a State Court from interpreting state constitutional provision so as to prevent such legislation.

In the case of Shields vs. Land Co., 94 Tenn. 123, 28 S.W. 668 (1894), the Court said:

"The constitutional provision upon which this contention is made is as follows:

"That no retrospective law or law impairing the obligation of contracts shall be made. Constitution of Tennessee, Article 1, Section 20."

"This does not mean that absolutely no retrospective law shall be made, but only that no retrospective law which impairs the obligations of contracts or divests or impairs vested rights, shall be made - - -."

The Court of Appeals offered the following reason as further justification for allowing the legislation to be applied retroactively:

[fol. 12] "Viewed as a matter of policy there is no unfair disturbance to vested rights in upholding the constitutionality of the 1972 amendment to T.C.A. 28-304. The reason for applying the vested-rights rationale to strike down retroactive legislation as unconstitutional is because such retroactivity is unreasonable when applied to a particular situation. Not all retroactive legislation is unconstitutional, but only that which deprives a person of his reasonable expectations under prior law.

"The policy of statutes of limitation is one of repose, but defendants cannot complain that their repose is unfairly disturbed by the 1972 amendment to T.C.A. 28-304 since there is no clear assurance of such repose even under the law as it existed prior to the 1972 amendment. It would be one thing if under preexisting law defendants could be assured that no cause of action in Tennessee would be filed under T.C.A. 28-304 based

on any sale of goods occurring prior to May 20, 1969, where a year had elapsed from the date of such sale. But there is no such assurance."

We cannot agree to the above reasoning. The Court states the retroactive legislation is unconstitutional "only when it deprives a person of his reasonable expectations under the prior law." The statute had run under the prior law prior to the amendment; and, therefore, petitioners had a right to "expect" under the prior law they would not be sued; but, if sued, they were assured of a perfect defense.

The judgment of the Court of Appeals in affirming the trial court in dismissing the warranty counts of the complaint is affirmed.

The judgment of the Court of Appeals in reversing the trial court in holding the other counts were barred by the statute of limitations and remanding the case is reversed and the judgment of the trial judge affirmed. Respondents will pay the costs.

/s/ Chester C. Chattin
CHESTER C. CHATTIN, JUSTICE

DYER, C.J.,
McCANLESS, J. AND LEECH, S.J., CONCUR:
FONES, J., DISSENTS

[fol. 1] [Caption Omitted in Printing]

DISSENTING OPINION

(Filed March 18, 1974)

I respectfully dissent from the ruling that Moulton's cause of action was barred on April 30, 1970, although his injury did not occur until July 5, 1970.

Moulton's count for breach of warranty has been dismissed and nothing said herein applies to a breach of warranty cause of action that may be asserted in the hybrid action known as a products liability case.

[fol. 2] The following principles are stated concisely in *Hodge v. Service Machine Company*, 438 F.2d 347 (6th Cir. 1971).

> "(2-4) A cause of action accrues when a suit may be maintained upon it. Black's Law Dictionary 37 (4th ed. 1951). A suit may not be brought upon a cause of action until it exists, and a cause of action does not exist until all its elements coalesce. In civil actions for damages, two elements must coalesce before a cause of action can exist; (a) a breach of some legally recognized duty owed by the defendant to the plaintiff; (b) which causes the plaintiff some legally cognizable damage."

To hold that a products liability action, which is a recognized legal right, is barred by a statute of limitations before any injury is sustained, deprives a person of the opportunity of redress for an injury done him in his goods or person by due process of law, contrary to our Constitution.

Article 1, Section 17 of the Constitution of Tennessee provides, as follows:

"*Open courts--Redress of injuries--Suits against the State.*-- That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. . . ."

I agree with the principle of *Girdner, et al. v. Stephens*, 48 Tenn. 280 (1870) that, once a cause of action is barred by a statute of limitations, the defendant acquires a vested right that cannot be disturbed by subsequent legislation. Absolutely essential to that principle, however, is the acquisition by the defendant of a vested right.

[fol. 3] In *Girdner*, plaintiff brought an action of trespass for alleged assault and battery and false imprisonment. It is elementary that in such an action the breach of legal duty and the injury occur simultaneously and are known to the plaintiff. His cause of action accrued on the date of the coalescence of the wrong and the injury, and the Courts were open to hear his complaint during the one year next following said date. Upon the expiration of that year, during which the Courts were open to redress plaintiff's injury, the defendant acquired a vested right to the repose provided by the applicable statute of limitation.

In the case sub judice we have a different situation. Simply stated, Moulton sustained an injury on July 5, 1970, under circumstances which permit his assertion of a products liability action, sounding in tort, for which he is guaranteed his day in court by Article 1, Section 17 of the Constitution of Tennessee. It therefore cannot be said that his remedy for that right expired on April 30, 1970, denying him even one day's access to the Courts. On April 30, 1970, defendant, Ford Motor Company, had acquired no vested right to the repose of a cause of action that did not come into existence until July 5, 1970.

I strongly embrace the principles underlying the judicial policy of stare decisis. But, it is not an inflexible policy and is deviated from where sufficient reason exists. 20 Am.Jur.2d 521, Courts, §184. I believe that sufficient reason exists for this Court to cure the error of accruing a cause of action for personal injuries before the injury occurs, notwithstanding stare decisis, or the [fol. 4] consequences thereof. The Legislature's two attempts to eradicate the error have not, at this point in time, cured the unjust result of denying a litigant his day in Court.

I would affirm the Court of Appeals for the reasons stated herein.

/s/ Wm. H. D. Fones
WM. H. D. FONES, JUSTICE

APPENDIX "C"

[fol. 1]

CHARLES L. MOULTON, ET US., *Petitioners*,	
VS	KNOX LAW
FORD MOTOR COMPANY, ET AL., *Respondents*.	

ON PETITION TO REHEAR

(Filed June 17, 1974)

Petitioners have filed an earnest petition to rehear. They insist we were in error in reversing the Court of Appeals and affirming the judgment of the trial court in holding that petitioners' counts sounding in negligence, strict liability and tortuous misrepresentation were barred by the statute of limitations; and that we further erred in upholding the dismissal of the warranty counts by the lower courts.

In support of the petition, able Counsel make essentially the same argument set forth in their original brief. In other words, it is a reargument of matters
[fol. 2] which we considered and determined in our original opinion. The petition reargues matters which Counsel insist were improperly decided.

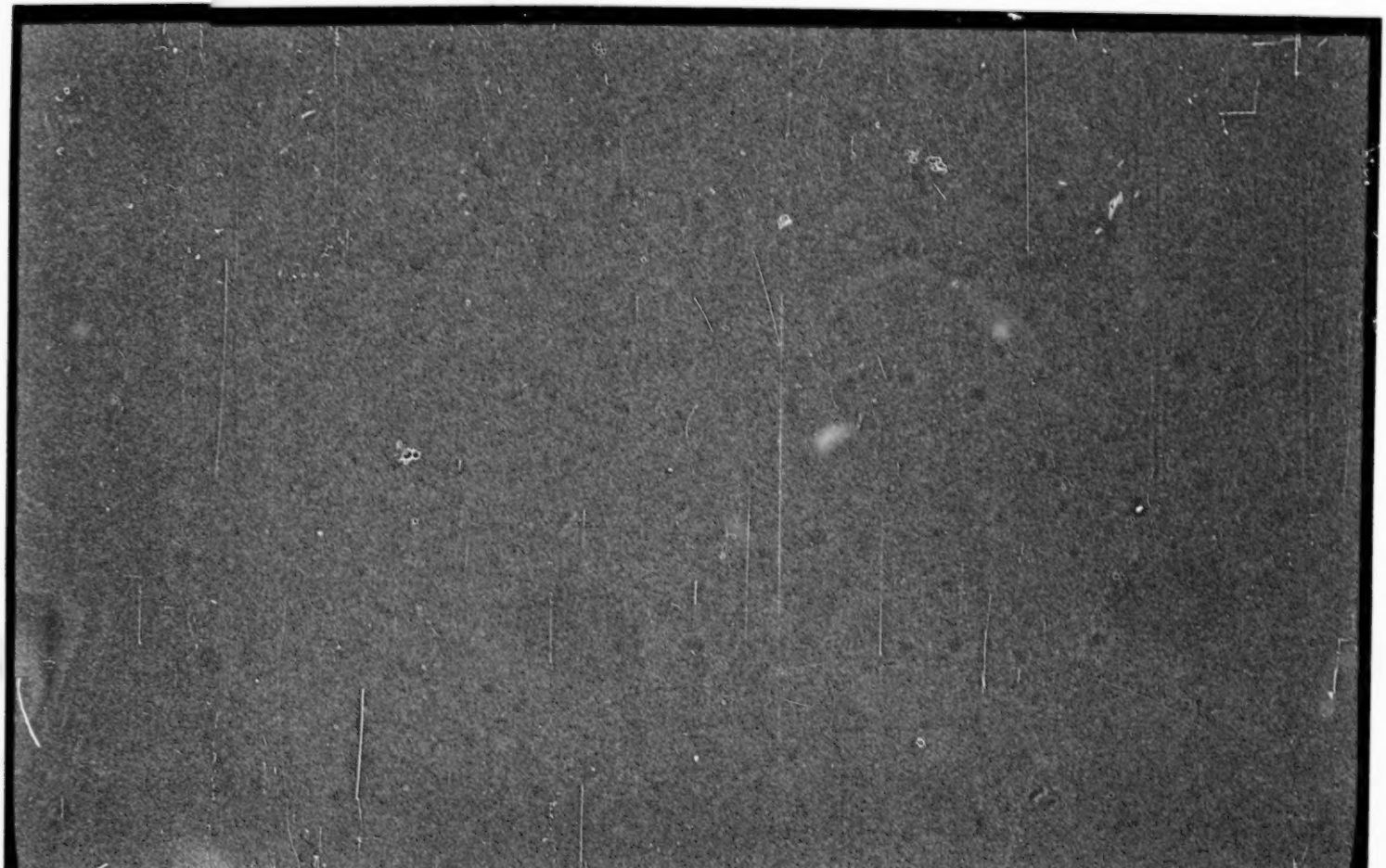
> "The office of a petition to rehear is to call the attention of the court to matters overlooked, not those things which the counsel supposes were improperly decided after full consideration." West vs. Carr, 212 Tenn. 367, 370 S.W. (2d) 469 (1963).

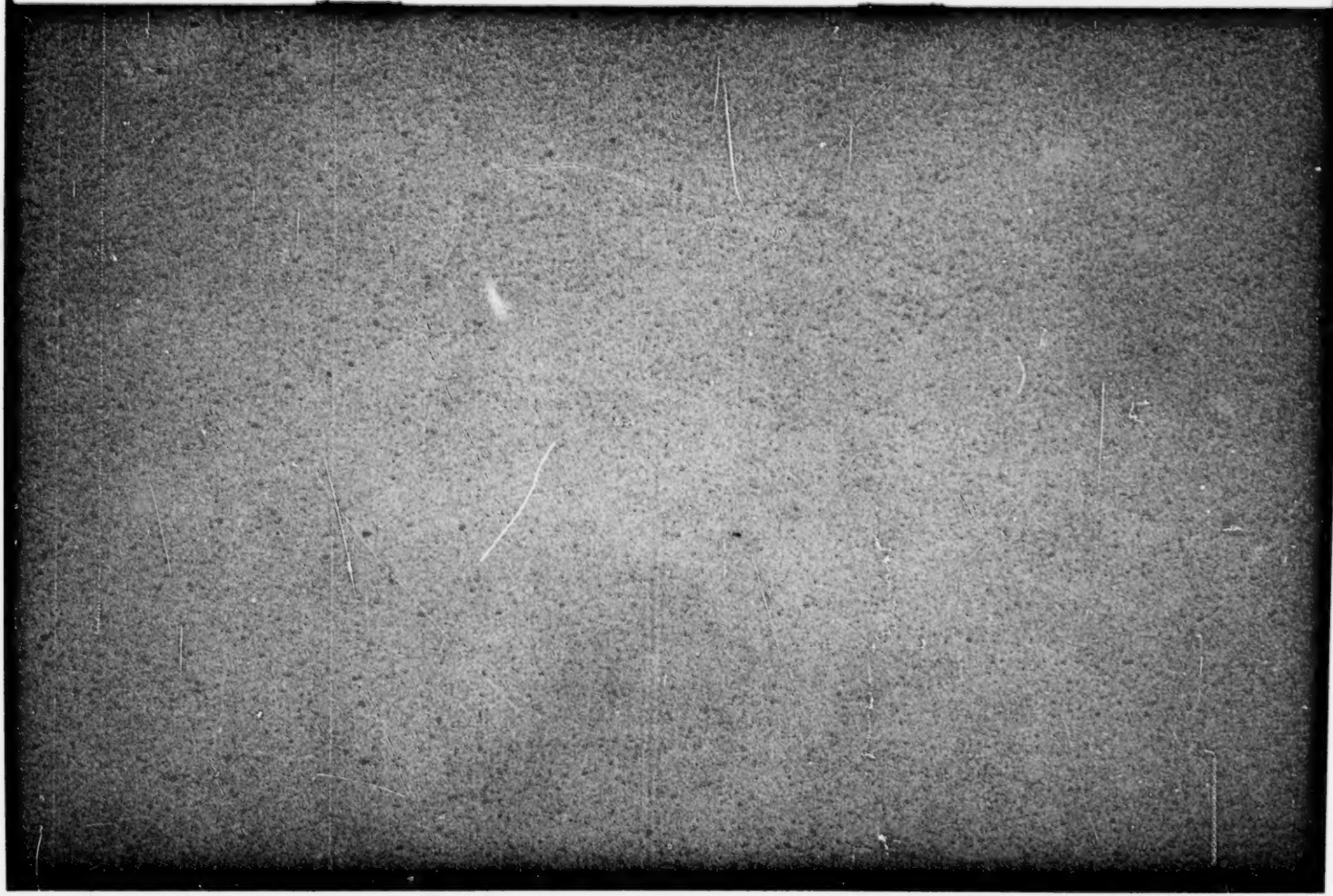
Appendix "C" - On Petition to Rehear

The petition is denied at petitioners' cost.

/s/ Chester C. Chattin
CHESTER C. CHATTIN
JUSTICE

DYER, C.J.,
McCANLESS, J., AND
LEECH, S.J., CONCUR.
JONES, J., DISSENTING.





IN THE

SUPREME COURT OF THE UNITED STATES

FILED
AUG 20 1974
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1974

NO. 74-91

CHARLES L. MOULTON and
PAULINE M. MOULTON,

Petitioners,

v.

FORD MOTOR COMPANY and
HULL-DOBBS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

BRIEF IN OPPOSITION

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8-8-74-80

IN THE

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OCTOBER TERM, 1974

NO. _____

CHARLES L. MOULTON and
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FORD MOTOR COMPANY and
HULL DOBBS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

BRIEF IN OPPOSITION

The matter presented involves no federal question or constitutional issue for this Court. While it is conceded that a revision of a statute of limitations *can* be construed as having retroactive effect without federal constitutional deprivation, there is no constitutional requirement that

such a revision *must* be construed as having retroactive effect in order to avoid a Fourteenth Amendment violation. The decision in *Campbell v. Holt*, 115 U.S. 620 (1885), is an example of this Court holding retroactivity as a permissive but not obligatory legislative intent. Consequently, the decision in *Moulton* carries out the clearly espoused rule of *Campbell* and therefore presents no federal question or constitutional issue for this Court.

Whether or not the common law or statutes of a state permit a recovery of damages by an occupant of an automobile against its manufacturer historically has been a subject exclusively within the discretion of the individual states. Petitioner confuses what he deems *desirable* with a constitutional mandate. Due Process requirements of the Fourteenth Amendment, clearly, do not foreclose the states from adopting laws, interpretations, rules, procedures, limitations and restrictions of uniform application defining the use of the Courts of the fifty states to redress alleged civil wrongs, nor does Due Process preordain, as Petitioner's position dictates, that this Court must now choose one point in time for statutes of limitation to begin to run from the gamut of multiple points now existent throughout the states, i.e. date of sale, date of wrongdoing, date of discovery, date of accident, etc. Traditionally, the states have chosen between the various possibilities without intervention and resolution by this Court. This is the essence of our common law system of torts and adjective law.

It is perhaps significant that while Petitioner asserts a legislative intent issue in his question presented, the remedy he seeks would necessarily require this Court to now upset *Jackson v. General Motors Corp.*, 223 Tenn. 12, 441 S.W.2d 482 (1969), and a long line of earlier Tennessee cases on the sole ground of unconstitutionality of

the law upon which *Jackson* depends. Manifestly, the *Moulton* ruling by the Tennessee Supreme Court is merely a reiteration of its Jackson ruling which, in turn, affirmed the long standing Tennessee statutory construction.

Petitioner cites *Jackson* on page 5, but fails to advise the Court that counsel in *Jackson* sought a writ of certiorari from this Court on the very basis of alleged Fourteenth Amendment violation of Due Process involved herein, and the previous application was denied at 396 U.S. 942 (1969).

Since no good reason for review by this Court has been shown, the petition for certiorari should be denied.

Respectfully submitted,

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August 13, 1974